



Generally Speaking

Comings and Goings

Please welcome **Leilani Tufaga** who joined the Commercial and Fair Business Section as a LOA I and **Angela Ramos** who started as an Administrative Clerk II in the Collections and Support Section.

The Labor and State Affairs Section is pleased to welcome **AAG Rachel Witty** to the Anchorage office; she will be advising the Division of General Services.

The Labor and State Affairs Section bid sad farewells to LOA **Patti Yeaple** who transferred to the Human Services Section, and LOA **Chris Curran** who left the section to complete his education.

LOA **Shelby King** transferred to the Human Services Section from the Oil and Gas Section, which will miss her.

LOA **Karyl Richards** became a full-time member of the RAPA Section. She had previously allocated her time to both RAPA and the Commercial and Fair Business Section.

Many congratulations to Kenai **ADA Scot Leaders** and his wife on the birth of their baby girl, Hannah Faith. Hannah was born on Sunday, August 27th weighing in at seven pounds and measuring 18¾ inches long.

Best wishes to **AAG Rob Nauheim**, Natural Resources Section, who retired from state service this month; he will be missed.

AAG Steve Ross is transitioning from the Natural Resources Section to the Environmental Section; he too, will be missed by the Natural Resources Section.

The Torts and Workers' Compensation Section said goodbye to **AAG Venable Vermont, Jr.** as he moved on to retirement this month, after 17 years with the Department of Law (and 22+ years as a State of Alaska employee).

After ten years of service in South Carolina and Alaska as a public defender, Venable joined the "Special Litigation" (now named Torts and Workers' Compensation Section) in 1989. Over the years Venable has forged much of the current tort law in Alaska on the issues of duty and immunity. Venable leaves very big shoes to fill; his shoes of choice are now his hipwaders.

Congratulations to the following for recent promotions:

Pam Post to Litigation Coordinator in the Environmental Section.

Kelly Gamble to Law Office Manager.

Nicole Offret to Paralegal in the Child Protection/Human Services Section.

Natalie Parish to LOA I in Child Protection/Human Services Section.

Heather Hebdon to LOA II in the Torts and Workers' Compensation Section.

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CIVIL DIVISION

Child Protection

CINA cases. New CINA cases of note based upon allegations in OCS petitions:

A mother brought her two-month-old child to the emergency room. The child had a broken femur and various bruises on her head, shoulder, cheek and thigh. The child's father ultimately confessed to causing the injuries and was arrested. The mother agreed to obtain a long-term restraining order against the father, but OCS has legal custody to ensure the mother follows through.

APD responded to a call at a bar where they found an intoxicated mother and her seven-month-old son. They allowed the child's uncle to pick him up. Later, when police went to the mother's hotel room to return the child's car seat, they found the mother passed out with the child in her care and the uncle not there. Further investigation revealed that the uncle was a registered sex offender. OCS took custody of the child and placed the child with an aunt, in whose home the mother could reside.

OCS took a developmentally disabled child into custody after numerous agencies reported the parents were unable to meet the child's needs. One of the problems was that the father repeatedly walked around nude in the home while service providers were present, causing them to refuse to return to provide much needed support.

OCS received reports that a three-year-old child living with her grandparents, played outside for hours unsupervised and that she had been observed crossing busy streets alone. On one occasion she got into a neighbor's yard and was attacked by a dog. When OCS investigated, they found the grandmother was intoxicated and the grandfather did not want to care for the child. OCS assumed custody.

Two children, ages 9 and 14, were found passed out in the middle of the night after stealing home brew from the mother. While the nine-year-old was intoxicated, the mother's boyfriend tried to touch her inappropriately. Despite the social worker's efforts to get the mother to take the child to the clinic, the mother did not seek medical assistance. The children

were removed from the home and placed with family members.

A developmentally disabled and homeless child also entered OCS custody. His parents' parental rights had been terminated as a result of abuse and neglect. The child was adopted by his grandparents, but they were unable to control his aggressive behaviors. The child then became involved in the juvenile delinquency system. When he was released from the delinquency system, OCS took him into custody because of concern that he could not care for himself.

New issue. A father's attorney filed a motion to declare that an informal meeting process used by OCS is a "critical stage", such that, counsel must be allowed to attend the meeting. OCS has adopted a process called "Team Decision Making" that is used in most states.

Through the use of facilitators, OCS calls an immediate meeting whenever a child is about to be moved, either from their own home, returned home, or between foster homes. Due to the emergency nature of some of these moves, the meetings are held on short notice.

The father's attorney complains that although he was invited to the meeting, he was unable to attend and therefore, OCS should have rescheduled to a time when he was available. OCS believes the meetings must be held immediately, and that the remedy available to a parent is immediate court review.

Although the motion was filed in a specific CINA case, the assigned judge has signaled that he believes his decision will have far-ranging effect in other cases and has invited all of the agency participants in CINA cases to respond to the motion.

Interesting case. In one of AAG Poke Haffner's cases, the mother of two had been on a meth run. The father of the younger child, her husband, was sent home from Iraq on compassionate leave to take care of his child.

The father of the older child showed up from California in the company of his stepmother the day of a status hearing. He wanted Judge Steinkruger to give the girl to him to take back to Sacramento that evening. Fortunately Judge Steinkruger didn't bite, and instead got him to disclose the name of his probation officer in Oregon. Although this father had testified to Judge

Steinkruger that he had completed probation for a burglary, his probation officer told us that he was not only still on probation for a felony involving meth, there were four outstanding arrest warrants out for him in Oregon for violating his probation.

By the time the next hearing rolled around, this father had become apprehensive about those warrants and had returned – precipitously – to his father's house in California, without the child. That child is in a licensed foster home. It is hoped the mother will go to the treatment recommended for her.

Other activities. AAGs Gayle Garrigues and Poke Haffner gave local CINA mediators a "CINA basics" seminar on August 11, including a lengthy question-and-answer period. It was so successful they have been asked back for a return engagement to talk about ICWA issues.

In other alternate dispute resolution news, AAG Poke Haffner and AAG Dianne Olsen met with Fairbanks Presiding Judge Mark Wood to prepare the ground for using settlement judges in CINA cases in the fourth judicial district. In addition, the judge agreed to require mandatory meetings of the parties under CINA Rule 13. These meetings facilitate settlement.

Commercial and Fair Business

Consumer Protection/Anti-Trust

Department Issues Business Advisory to Car Rental Companies Warning of Unlawful Fees. The Department, through the Commercial and Fair Business Section, issued a Business Advisory to all Alaska car rental companies warning that "vehicle licensing fees" ("VLF's") must be included in the advertised rental rate. VLF's are commonly charged in Alaska. Car rental companies claim these fees are necessary to recover the cost to license and register rental cars with the Department of Motor Vehicles. The Department determined these fees are nothing more than a cost of doing business, and cannot be charged as a separate "add-on" item. If a company chooses to charge a VLF, it must be included in the advertised rental price to avoid potential confusion by customers who may think this is a state mandated charge. Failure to comply with this Business Advisory could result in action against the rental car company under Alaska's Consumer Protection Act, which

includes penalties up to \$25,000 for each separate transaction that violates the Act.

Division of Corporations, Business and Professional Licensing

Hearing

In Re Bohart. During August, AAG Gayle Horetski represented the Division of Corporations, Business, and Professional Licensing in an administrative hearing following the denial of an application from David Bohart (Fairbanks) to be licensed as a Mechanical Administrator (MA) in the specialty category of heating, cooling, and process piping. The issue was whether Bohart's extensive experience in service and repair of mostly residential heating systems was sufficient to meet the requirements for a MA license under board regulations. Bohart testified, as well as witnesses from both the Department of Labor and Workforce Development and the Department of Commerce, Community, and Economic Development. Dale Whitney is the ALJ assigned to the case.

Decision

In Re Sorenson. On August 14, 2006, following a one day hearing in November 2005, ALJ Andrew Hemenway issued a proposed decision recommending that the State Medical Board (Board) impose a fine of \$5,000 and a letter of reprimand against Anchorage paramedic Kurt Sorensen based on his felony conviction of misconduct involving a controlled substance in the fourth degree. Sorensen was the former battalion chief for the emergency medical service component of the Anchorage Fire Department (AFD) and was required to maintain, inspect and ensure the accuracy of the drug distribution logs. As he later admitted as part of a plea bargain, on three separate occasions in 2004, Sorensen knowingly omitted material information from a drug inventory log in violation of AS 11.71.040(a) (8).

Each time he removed morphine and/or fentanyl from his safe for transfer to AFD ambulances or fire engines, for unknown reasons, he never completed the transfers and no one knows where the narcotics actually went. The Division of Corporations, Business and Professional Licensing (Division) filed an accusation against Sorensen based on AS 08.64.326(a) (4) (B) (conviction of a Class B

or C felony if it is substantially related to the qualifications, functions or duties of the licensee) and AS 08.64.326(a) (9) (unprofessional conduct defined by regulation as including conviction of a felony). The ALJ found that those statutes constituted proper grounds for discipline.

However, in recommending sanctions, the ALJ described Sorensen's conduct as a record-keeping offense and relied on prior cases where licensees were disciplined for engaging in non-criminal wrongdoing connected to controlled substances. The Division has filed a proposal for action under AS 44.64.060(e), requesting that the Board suspend Sorensen's paramedic license, based on cases where licensees were convicted of felony misconduct involving a controlled substance. AAG Robert Auth represented the Division at hearing and throughout this proceeding.

Environmental

Kensington Appeal Moves to Ninth Circuit. On Aug. 3, 2006, Federal District Court, Judge Singleton, rejected a challenge to the federal permit for the disposal of the tailings to be generated at the Kensington mine near Juneau. The Army Corps of Engineers (COE) had issued a "fill" permit for the placement of the tailings in a small lake, and some environmental groups sued, arguing that the Clean Water Act required that such activity be authorized by EPA instead, as the disposal of pollutants. The state and the mining company, Coeur Alaska, as well as the local ANSCA native corporation, all intervened on the side of the COE, in its successful defense of the fill permit.

On the same day of Judge Singleton's decision, the plaintiffs appealed the case to the Ninth Circuit Court of Appeals, where they have also moved for an injunction of further mine construction pending the appeal. The state and the other defendants opposed that motion, but on August 24 the Ninth Circuit granted the injunction, ordering that work on the tailings dam cease until the Court reviews the case on the merits. The section will brief the appeal on an expedited basis and plan to get it before the Court for a decision by November.

Human Services

Litigation Update

Certificates of Need (CON). AAG Stacie Kraly concluded a two-day administrative hearing related to a denial of a Certificate of Need in Anchorage. It was the first hearing based upon the new standards and methodologies for the Certificate of Need Program. Post hearing briefs are due September 1, 2006.

In early August, AAG Kraly also participated in an oral argument related to the Certificate of Need Program in Fairbanks. The hearing was on a motion for preliminary injunction arguing that a regulation adopted by DHSS was invalid because it exceeded the statutory grant of authority. Judge Steinkruger agreed with that position and found the regulation invalid. DHSS has already moved to repeal the offending portion of the regulation.

Disability Law Center v. API. The Federal District Court denied the state's motion for protective order in the *DLC v. API* matter. AAG Stacie Kraly is now in discussions with the Disability Law Center to dismiss this matter, subject to an agreement on attorney's fees.

Personal Care Program Challenge. A new complaint was informally served related to the personal care program. The lawsuit is very similar in scope to litigation the section is involved in related to Medicaid Waivers.

Medicaid

Subrogation/Liens

In August, \$86,958.49 was collected as a result of 23 resolutions; the average collection per case was \$3,780.90. For calendar year 2006 to date, the total collected is \$1,419,305.57. The monthly collection average, year to date, is \$177,413.20.

At the present time, there are 580 open matters with the resolution of 416 matters tracked.

In September, the section anticipates meeting with representatives of the plaintiff's bar to discuss Medicaid lien and subrogation issues, and also anticipates attending a conference that will include topics pertinent to Medicaid third-party recovery programs, including a discussion of the impact of the U.S. Supreme Court's *Ahlborn* decision.

Licensing

The section continues to be very busy in the licensing arena having taken over full-time advice for day care and foster care licensing. These programs, along with assisted living, are very active right now. AAG Rebecca Polizzotto has four hearings scheduled in the next 40 days.

API/APS

AAG Beth Russo has been handling all API and APS matters since July. The transition has been smooth, and the section is working through some interesting issues relative to API and APS.

Regulations

AAG Kelly Henriksen continues to work on a variety of regulation projects for the DHSS, which has allowed the rest of the section to concentrate on other agency matters.

Labor and State Affairs

Alaska Public Offices Commission

Alaska Right to Life Committee v. Miles. On August 25, on behalf of the APOC commissioners and Executive Director Brooke Miles, AAG Mike Mitchell filed with the U.S. Supreme Court, the state's opposition to the Alaska Right to Life Committee's petition for certiorari. The state opposes review of the Ninth Circuit Court's decision upholding the constitutionality of Alaska's regulation of "electioneering" under the First Amendment on the basis (among others) that the Court recently considered and upheld a very similar regulation of nonprofit election activity in *McConnell v. Federal Election Commission* (addressing the constitutionality of the Bipartisan Campaign Reform Act).

Court System

Koedler v. Rindner & Alaska Court System. The Palmer superior court dismissed this complaint on July 26, 2006. Craig Knoedler sued Judge Rindner (although Judge Rindner had not actually presided over the case) and the court system after his complaint against the Alaska Housing Finance Corporation was dismissed. He claimed the court wrongfully refused to allow 3,000 members of the Moose Lodge to testify regarding naked pictures of him allegedly circulated to Moose Lodge members by an employee of AHFC. The state moved to dismiss on grounds of improper service and failure to state a claim for which relief may be granted. The court granted the motion and dismissed the case with prejudice. This case was handled by AAG Margaret Paton Walsh.

Employment and Labor Relations

ACOA v. State. On August 15, former Director of Labor Relations Art Chance filed an unfair labor practice charge with the Alaska Labor Relations Agency on behalf of the Alaska Correctional Officers Association (ACOA) claiming that the state is required to negotiate with ACOA over the subject of retirement benefits for its members. AAG Bill Milks will be representing the state.

Crowley v. State. On August 8 Superior Court Judge Bill Morse issued summary judgment in favor of the state in this action by a former social worker who filed suit for wrongful termination based on breach of contract and age and race discrimination. Judge Morse dismissed the discrimination claims because the plaintiff failed to meet her burden to demonstrate that the reasons provided for the dismissal were pre-textual, and dismissed the contract claims because plaintiff failed to exhaust the grievance procedure in the union contract. The case is noteworthy because the court reversed itself after a motion to reconsider. This matter was handled by AAG Richard Postma.

State v. Alaska Public Employees Ass'n. On August 16, AAG Bill Milks moved for summary judgment on behalf of the state in this action to vacate parts of an award against the state in an employment grievance arbitration. At issue are an award to a former employee of interest on back wages and of attorney's fees and costs incurred in related litigation in superior court (but which the court had denied).

Baseden v. State. The state is embroiled in a number of actions filed by former employee Steve Baseden. Two involve challenges to arbitration decisions addressing Baseden's termination from state employment. The third is an attempt at a wrongful termination suit. The three cases were consolidated. After the court granted the state's motions to dismiss and entered judgment for the state, Baseden moved to amend the judgment, for summary judgment against the state, and to enforce an arbitration award. AAG Bill Milks opposed the motions on behalf of the state, arguing that the wrongful termination suit raised the same claims as the other two cases and was properly dismissed, and arguing that enforcing the arbitration was not before the court because Baseden sought to vacate (rather than enforce) the arbitration awards. Judge Collins ruled for the state on July 27, essentially agreeing with the State's arguments.

Baseden appealed and then filed another action against the state. In the new complaint he argues that AS 39.25.150(7) (allowing the state and bargaining representatives to agree to extend an employee's probationary period) is unconstitutional because it violates the merit principle embodied in the state constitution. AAG Bill Milks will also represent the state in this action.

Legislation

Keith Coonrod, Ray Metcalfe, and American Civil Liberties Union of Alaska v. State of Alaska. This action seeks to declare unconstitutional the property tax exemption created by Chapter 44, SLA 2006 for teacher housing owned by religious organizations. Two months after filing the action, plaintiffs filed a motion for preliminary injunction and for expedited handling. AAG Richard Postma opposed the motion for expedited handling on August 23. Previously, AAG Postma filed a motion to consolidate the action with *Baxley, et al. v. State*, which makes a similar challenge against the property tax exemption.

Local Boundary Commission

Skagway Petitioners v. Local Boundary Commission. On July 24, the Skagway petitioners appealed the superior court's determination that the Skagway petitioners were not public interest litigants to the Alaska Supreme Court. AAG Mike Mitchell is handling the case.

Kachemak Area Coalition, Inc. v. Local Boundary Commission. On August 22, Judge Rindner rejected the arguments of appellant and affirmed the decision of the Local Boundary Commission to annex property to the City of Homer. It determined that the issue implicated the special expertise of the administrative agency and concluded that the reasonable basis test was the appropriate standard of review. Finding a reasonable basis to support the annexation decision, the court affirmed it. AAG Margie Vandor represented the state agency.

Motor Vehicles

Winterowd v. State. On July 26, Judge Burgess granted the state's motion to dismiss, holding that the federal district court lacked jurisdiction over the case under the *Rooker-Feldman* doctrine. Ralph Winterowd had sought a declaratory judgment that his Chickaloon driver's license was valid in Alaska and an injunction against the state to prevent further criminal prosecution of him for driving without a valid license. The court held that this effectively required the federal district court to review a state court judgment, something that only the United States Supreme Court has authority to do. AAG Margaret Paton Walsh handled this matter.

Occupational Safety and Health

An OSH contest involving Waterkist Corp. settled before hearing. The company agreed to accept all of the violations cited against it and a fine of \$35,000.00. The corporation no longer is in business and claims not to have assets. The company assigned its rights to a \$10,000 cash fish processing bond that the state is holding and pledged proceeds from a settlement or judgment that the corporation may receive in the future from Exxon. AAG Larry McKinstry represented the state in this matter.

AAG Larry McKinstry also represented the state in another OSHA contest that settled—Crazyhorse, Inc. The company accepted the citations against it in exchange for a 50 percent reduction of the penalty to \$2,125.

Legislation and Regulations

During August 2006, the Legislation and Regulations Section spent an active month editing draft legislation for the 2006 third special session. The third special session adjourned August 10, 2006. The section also edited legal review for bills passed in the third special session.

The section also performed legal reviews of several regulations projects, including: (1) Board of Fisheries (Prince William Sound Area sport fishing in Eshamy Lagoon); (2) Board of Game (predation control areas and implementation plans; taking and use of game in the Interior Region); (3) Board of Marine Pilots (applications; licenses; miscellaneous amendments); (4) Board of Registration for Architects, Engineers, and Land Surveyors (education requirements); (5) Alaska Commission on Postsecondary Education (residency requirements and institution names); (6) Department of Natural Resources (anadromous waters atlas and catalog); (7) Department of Education and Early Development (corrective action for failure by a school district to show adequate yearly progress, and procedures for informal review of complaints; physical examinations of school employees; high school graduation qualifying examination (HSGQE) scores; teacher performance review standards; teacher criminal history background checks); and (8) Non-APA Personnel Board Regulations (notice for resignation in good standing; loss of eligibility, overpayments; notice deficiency).

The section is making plans for the annual regulations training classes in September 2006 for state agencies and assistant attorneys general. The classes are planned for Anchorage and Juneau.

Natural Resources

Federal Fish and Game Issues. During the month of August, AAG Steven Daugherty assisted the Department of Fish and Game with a number of federal issues. These issues included development of proposed language for inclusion in the revision of the Magnuson-Stevens Act, development of responses to fishery proposals and closure policies under consideration by the Federal Subsistence Board, and development of responses to efforts of Federal Subsistence Board members and federal staff to

attempt to create new and expanded subsistence fisheries in the Kenai and Kasilof drainages.

Wilber v. CFEC. The state received a favorable decision from the superior court in Sitka in this administrative appeal concerning the geoduck fishery. Under the limited entry regulations for the geoduck fishery, Wilber was granted a non-transferable permit, as opposed to a fully transferable permit. He appealed this decision, arguing that the regulations improperly defined the relevant harvest years (for purposes of determining participation points) by including three twelve-month periods and one eighteen-month period. He argued that these regulations were inconsistent with CFEC's statutory authority, and were arbitrary and unreasonable. He also argued that the scheme violated principles of equal protection.

Judge Larry Zervos upheld the regulation, holding that the Commission had a reasonable basis to interpret the limited entry statute the way it did, and that it had broad discretion to determine how to account for the peculiarities of the fishery, including discretion to define the eighteen-month harvest year (which included only one 4-day opening). He also held that the system bore a fair and substantial relationship to the legislative purposes of the limited entry statute and did not violate principles of equal protection. The state has moved for an award of attorney's fees. Former AAG Stan Fields briefed this case.

Board of Agriculture and Conservation meeting. AAG Sabrina Fernandez attended the August Board of Agriculture and Conservation meeting and a board work session to talk about a new comprehensive plan for agriculture. The Board voted to cancel the request for proposals for purchase of the Mt. McKinley Meat and Sausage plant which was slated to close by the end of the year.

Alaska Grown Litigation Update. In the ongoing state trademark infringement litigation over the Alaska Grown Logo, AAG Steve Ross successfully opposed motions to dismiss and change venue. Trial in the matter is set for April 2007. In a related matter, the State of Alaska filed a notice of opposition to the Mat-Su Chapter-Alaska Farm Bureau, Inc.'s attempt to federally register the Logo with the U.S. Patent & Trademark Office.

Opinions, Appeals and Ethics

The section did not receive any new complaints and two complaint files were closed. Quarterly reports submitted by designated ethics supervisors were reviewed and a summary of the reports was submitted to the Personnel Board. Two requests for conflict waivers were received during the month.

Appeals

Briefs

Copeland v. Commercial Fisheries Entry Commission, S-12275. AAG Laura Bottger filed the state's appellee brief in this appeal of the Commission's denial of a limited entry permit for the Prince William Sound purse seine fishery. Copeland qualified for sixteen points under the Commission's point system, but seventeen were required to earn a permit. Copeland appealed the Commission's refusal to award him any discretionary points, but he failed to demonstrate any special or unavoidable circumstances that would justify the award of additional points under the regulations or the Supreme Court's precedent.

Zimmerli v. Administrator, Public Employees Retirement System. This is an administrative appeal to the superior court of a Public Employees' Retirement Board decision. The question involved is whether the Board erred in concluding that, under the public employee retirement system, Department of Natural Resources' park rangers are entitled to "all other" category benefits, which the majority of public employees receive, rather than enhanced "peace officer/firefighter" benefits. Oral argument is scheduled for August 31.

Decisions

B.C. v. State, OCS. The Alaska Supreme Court denied a parent's petition for review of a trial court's child-protection probable cause order in a case where OCS had taken emergency custody of a two-year-old child when the child's 18-year-old mother was arrested for DUI. The mother stipulated that probable cause existed to find the child to be a child-in-need-of-aid. The father contested the probable cause finding, claiming that the child was safe in his care. The trial court considered the 20-year-old father's untreated alcohol abuse problem, arrests for alcohol related offenses, and failure to pay child

support. The court noted that the parents are locked in a very acrimonious custody dispute, and that the child has been placed at medical risk because of their refusal to communicate.

The court found probable cause and granted the state temporary custody, but allowed the child to be placed with the father, conditioned upon the father's continuing to reside with his own parents, who, the court found, have been the child's primary care providers. The father petitioned the Supreme Court for interlocutory review of the probable cause finding; the state responded that the father had not shown any need for the Supreme Court to intercede before an appealable order is issued in the case, and the Court agreed.

Clugston v. Smith, et al. This case, which was filed in federal district court in June 2006, involved a dispute over child custody and child support orders entered by Alaska Superior Court Judge Eric Smith. The plaintiff, Leon Clugston, challenged Judge Smith's authority to enter such orders, as well as the authority of three Child Support Services Division employees and a former assistant attorney general to implement or enforce Judge Smith's orders. The district court granted the defendants' motion to dismiss, concluding that under the Rooker-Feldman doctrine it did not have subject-matter jurisdiction, that Judge Smith was entitled to judicial immunity, and that Mr. Clugston's complaint was frivolous. Mr. Clugston subsequently moved for reconsideration. The district court denied the motion and closed the case.

Smith v. Stafford and Cox. AAG Megan Webb filed a brief with the Alaska Supreme Court on behalf of appellees Stafford and Cox, two social workers employed by the Office of Children's Services. The appellant Vernon Smith is the father of a child who was the subject of a CINA case from April 2000 to November 2002. Two and a half years after the commencement of the CINA case, Smith obtained legal and physical custody of his daughter, and the CINA court dismissed the case. After dismissal of the CINA case, Smith filed a civil action against Cox and Stafford, pursuing a 42 U.S.C. § 1983 claim, as well as civil conspiracy, libel, slander, false reporting, false statements, and abuse of authority tort claims. The gravamen of Smith's claims was that Cox and Stafford had prosecuted the CINA proceeding with the goal of terminating his parental rights rather than

reunifying him with his child, had unreasonably restricted his contact with his child, and had defamed him.

Cox and Stafford sought dismissal of the complaint, asserting that, under the doctrine of collateral estoppel, Smith was barred from re-litigating any material issues of fact decided by the CINA court. In relation to the § 1983 claim, they asserted that it should be dismissed since Smith could not demonstrate a deprivation of a federal constitutional right and, in the alternative, that they were entitled to qualified immunity. Finally, in relation to the state tort claims, they asserted that they were protected by the doctrine of official immunity. The trial court concluded that, under these separate theories, Cox and Stafford were entitled to summary judgment and dismissed the complaint in its entirety. The issues on appeal are whether Smith was barred under the doctrine of collateral estoppel from litigating the civil case, whether Cox and Stafford were entitled to qualified immunity in relation to the § 1983 claim, and whether they were entitled to either absolute or qualified immunity in relation to the state tort claims.

Other Matters

The section completed the public comment period for proposed regulations governing complaints against hearing officers and administrative law judges. The regulations describe procedures for investigating, hearing, and resolving complaints alleging violations of the code of hearing officer conduct.

Regulatory Affairs and Public Advocacy **(RAPA)**

Hearing

U-06-02, Enstar/Marathon gas supply contract.

After a month-long recess, hearing in this case resumes August 22, 2006. In the interim, the Commission issued an Order (U-06-002(12)) that sanctioned Marathon Oil Co. for its failure to produce certain LNG information by striking portions of the pre-filed testimony of Marathon witness Henning. The hearing will resume with the cross-examination of Marathon's witnesses, followed by those of RAPA and Tesoro. Enstar presented its case before the recess. Enstar filed the proposed gas supply agreement (GSA) with Marathon for supply of natural gas from

Marathon's proven reserves in the Cook Inlet beginning in 2009. The contract proposes to use a 12-month average of the Henry Hub Index (HHI) to price the gas. The AG/RAPA opposes the use of HHI under the circumstances and has proposed an alternative pricing proxy.

New Case

U-06-76/77, GHU/CUC rate cases. The AG elected to participate in the rates cases recently filed by Golden Heart Utilities/College Utilities Corp. of Fairbanks. The utilities seek an 8% increase in water rates and a 15% increase in wastewater rates. This proposal is based upon 2005 test year expenses. It follows closely on the heels of prior rate increase proposals (based upon a 2004 test year) by the same utilities that are scheduled to go to hearing the week of August 28, 2006 in RCA docket U-05-43/44.

RAPA Intervention Summary Update

As of August 24, 2006, RAPA is involved in 17 dockets before the RCA, including sixteen adjudicatory matters in which the Attorney General has elected to participate as a party and one rulemaking proceeding in which RAPA has participated in ongoing workshops. RAPA also monitors numerous other matters before the RCA and provides policy analysis to the Attorney General, and through the Attorney General, to the Governor's Office, as requested.

Torts and Workers' Compensation

DeNardo v. Morse, Rindner, Suddock, Cutler, Gleason, Greenstein, Alaska Comm. Judicial Conduct, Alaska Court System, and Alaska Bar Ass'n. Dan DeNardo has filed a series of lawsuits in recent years that attempt to re-litigate issues previously decided, by naming opposing counsel and even judges as defendants or changing the relief requested from monetary damages to declaratory and injunctive relief. Dispositive motions have been filed in one of these cases, in which he's sued five Anchorage Superior Court judges, the court system, the Judicial Conduct Commission, its director, and the Alaska Bar Association. The judges and the court system have moved for summary judgment on grounds that Mr. DeNardo cannot re-litigate issues and judgments that have been raised in earlier cases, under the doctrines of res judicata and collateral estoppel; the proper

recourse is to file an appeal or move to vacate the judgment under applicable rules. In addition, the motion demonstrates that neither a declaratory judgment nor an injunction is appropriate in this case.

The judicial defendants also ask the court to require any future cases by Mr. DeNardo against judges to be submitted to a pre-filing screening process. That same request has been made in a brief filed in the Alaska Supreme Court on behalf of Judge Rindner, in another case set to be argued in October.

Transportation

Air tanker procurement cases ended. A disappointed bidder for a contract to supply airplanes to carry water for firefighting brought administrative and judicial actions against DNR. After years of litigation, during which AAG Gary Gantz was able to test his trial skills against our formidable former Attorney General and mentor Charlie Cole, the Alaska Supreme Court issued a decision in another procurement case answering one of the key remaining legal issues. This allowed the parties to settle their dispute, with DNR agreeing to waive a fee award in exchange for the bidder agreeing to dismiss its appeal of the state's administrative decision and collateral superior court action.

Farmer case moves out of the Nuclear Regulatory Commission. A DOT&PF nuclear safety officer alleged DOT&PF retaliated against him after he reported nuclear safety violations. The Nuclear Regulatory Commission found safety violations. However, after considerable investigation, the Nuclear Regulatory Commission issued two reports determining that DOT&PF did not retaliate against the safety officer when he was transferred to another position and later when he was terminated. The second report, issued in this past month, concluded the Nuclear Regulatory Commission's long-running investigation of this matter. The safety officer is continuing his quest for relief through a state law whistleblower action in state court. AAG Gary Gantz represents the state.

DOT&PF prevails in Deadhorse rent dispute. NANA rents property from DOT&PF at the Deadhorse airport. NANA protested a rent increase, arguing the increase raised the rent higher than fair market value. NANA argued fair market value must be determined by

comparing to other rental rates in Deadhorse even though all other rental properties in Deadhorse were owned by DNR, and DNR's rental rates were controlled by statute rather than a fair open market. DOT&PF had instead determined fair market value by comparison to other rural airport property around the state. The superior court found DOT&PF had a reasonable basis for its method of determining fair market value. The superior court also upheld DOT&PF's valuation of the property in question as developed, rather than undeveloped, because it was improved with gravel fill. AAG Leone Hatch represented DOT&PF.

Ninth Circuit upholds favorable Nondalton Road

decision. The Ninth Circuit Court of Appeals rejected a challenge to the construction of a proposed highway between Iliamna and Nondalton. Robert Gillam argued the Alaska Department of Transportation and Public Facilities' system for allocating funds for rural highway projects violated the civil rights and equal protection rights of non-rural residents. Former transportation section and current Labor & State Affairs section AAG Larry McKinstry argued the case before U.S. District Court and the Ninth Circuit Court of Appeals. Gillam has other cases in progress challenging the construction of the Iliamna-Nondalton Road.

CRIMINAL DIVISION

Anchorage DAO

Antonio Garrison sentenced to 42 years in two murder cases. As a result of a plea bargain with the state in two murder cases, Judge Phil Volland sentenced Antonio Garrison to 42 years in jail for the murders of Paul Clinton in November 2000 and Tawni Williams in June 2001, 21 years in each case consecutively. The judge restricted Garrison's parole eligibility so that he must serve 28 of the 42 years.

On November 1, 2000, Paul Clinton was found shot to death inside the office of Clinton Auto Sales on Gambell Street in Anchorage. A friend of Clinton's called the police department about 3:00 p.m. to report that the business was locked and he had not seen Paul Clinton for several hours. Police forced the door to the business open and found Paul Clinton inside, dead from a gunshot to the back of his head. An employee of the dealership told police that one

vehicle was missing from the lot, a 1997 Chevrolet pickup truck. The next day police stopped the missing Chevrolet pickup. The defendant Antonio Garrison, his wife, and children were in the pickup. In studying the books of the dealership, police found that Antonio Garrison owed Paul Clinton's dealership several thousand dollars for a 1990 truck Garrison had bought earlier.

Police interviewed Antonio Garrison. Over the course of four interviews, he said he had been in the automobile business and had bought and sold automobiles to Paul Clinton at Clinton Auto Sales. He had just bought the 1997 Chevrolet pickup and had paid \$4,000 for it on November 1, 2000, but did not have a receipt for the payment. Garrison then explained the following: He said that Paul Clinton had been too busy to give him a receipt, so he returned on the afternoon of November 1, 2000, to get the receipt. When he got there, he found Paul Clinton dead. He explained he did not call police because he saw a handgun, apparently the murder weapon, lying on the floor by the body and recognized it as a handgun he had sold to Clinton. Fearing he, as a convicted felon, could get prosecuted for having possessed the handgun before the sale, he picked up the gun and left the building, locking the door behind him. He gave the gun to his brother.

Police traced the gun through the brother to a pawn shop, where they located it and took custody of it. The laboratory said the weapon could have been the weapon that killed Clinton, but there were not sufficiently unique markings to identify it exclusively.

Meanwhile, in May, 2001, Tawni Williams hired Antonio Garrison to remodel her trailer in Anchorage. She gave him her credit card and pin number to pay for materials. On May 18, 2001, Garrison and a man he had hired to help with the work on Tawni Williams home, Curtis Kragero, took Tawni Williams to an area off Knik-Goose Bay Road and killed her with a .22 rifle. In August, 2001, Kragero told others about the crime and they called Crime Stoppers. He told police about the killing and took police to the place where Tawni Williams was buried. The body was buried on land belonging to Garrison's sister. Kragero's statements were also corroborated by the fact that, after May 18, the credit card Tawni Williams had given to Garrison was used daily to withdraw the maximum amount of \$500. Kragero said Garrison had

given him the .22 rifle to hide and he lead police to the person he had given it to.

In September, 2001, a cellmate of Garrison's at Cook Inlet called police about statements Garrison had made to him in jail. The cellmate said that he used .38 bullets in his .357 to kill Williams because .38 bullets would only fit loosely in the gun and would be difficult to match to the gun. He also said Garrison told him he was left-handed, but used his right-hand to do the shooting to disguise his identity. The cellmate added that Garrison told him he had stolen \$18,000 to \$20,000 from the dealership after the shooting, and police estimates that more money than that had been stolen, were exaggerated.

Garrison was charged with both murders. In June, 2003, while the two murder cases were pending, another of Garrison's cellmates came forward to report a scheme Garrison had concocted to create falsely exculpatory evidence in the Paul Clinton homicide. Garrison asked the cellmate to buy a gun like the one used to kill Clinton, to remove the serial numbers, to get dirt from the auto sales dealership and bury the gun with a mixture of saltwater and the dirt from the dealership, and then dig up the gun and put it under the ramp located at the front of Clinton Auto Sales. He told the cellmate that, one day before his trial was to start, he should go to the dealership with his children, have his children discover the gun under the ramp, and then make a Crime Stoppers call to report the finding of the gun.

Since the evidence in both cases was circumstantial or depended on the testimony of jail birds, the state entered into a plea agreement under which Garrison plead to two counts of murder in the second degree to be sentenced to 21 years in jail on each murder, consecutively, with a parole restriction that will prevent his release from jail until he has served 28 of the 42 years. ADA John Novak inherited the cases in early 2006 and negotiated the plea bargains and sentence.

Ralph Inga convicted of sexual assault on incapacitated woman. Ralph Inga was tried for sexual assault in the second degree with an incapacitated person and was found guilty by a jury before Judge Phil Volland.

In May 2004, Ralph Inga was a guest in a trailer home in South Anchorage where a mother and her

adult daughter lived. At the time, the defendant was on felony probation for a previous sexual abuse of a minor in the third degree conviction. The daughter had been the victim of that crime and it was a condition of probation that he not have any contact with her.

Nonetheless, the mother gave Inga, her ex-boyfriend, her permission to sleep on the couch.

On May 22, 2004, the daughter went out for an evening of drinking with her friends. She returned about 4:00 a.m., intoxicated. Inga was awake when she arrived home and they argued. She went into her bedroom and he followed; she told him to get out and he did. The daughter went to bed wearing shorts, underwear, and shirt and lay down in a bed with her five-year-old son and two nephews, ages seven and nine. When she awoke the next morning, she was naked from the waist down. She found her shorts on the bed and her underwear in a laundry room.

Judge Volland did not admit the evidence that the defendant had previously engaged in sexual abuse of the same person and did not even admit evidence that the defendant was on probation and was not supposed to have any contact with the victim.

The jury, nonetheless, convicted. ADA Taylor Winston tried the case for the state.

Michael Davis convicted of felony DUI. On August 23, 2006, an Anchorage jury convicted Michael Davis of felony DUI and driving with license suspended.

On August 31, 2004, an FAA employee called 911 to report a car crashed into a tree near Carr's on Boniface Parkway. A responding APD officer found Michael Davis behind the wheel bleeding from the chin. Paramedics transported Davis to Providence Hospital, where the officer could smell alcohol on his breath and Davis gave confusing answers to the officer's questions. The hospital drew blood for medical purposes, with a result of .275 blood alcohol.

Davis had four prior DUI convictions, the latest in 1999 being a felony conviction. In addition, as of 2004, his license was suspended for the next two years. The jury convicted Davis of felony DUI and DWLS.

The trial judge had severed three counts of violations of the conditions of release. First, on August 14, 2005, Davis had violated the conditions of his release by leaving his third-party custodian, drinking, and slapping his wife when he came home drunk. On March 16, 2006, he was again found outside the presence of his third-party custodian. This time bail was set at \$10,000 cash and electronic monitoring. In May 2006, he tested positive for cocaine and marijuana and a bail hearing was set for May 16. He did not appear for his bail hearing. Instead, his third-party custodian appeared with his ankle monitor, but not with him. Someone had cut off his ankle monitor. The third-party asked for the \$10,000 back; the judge denied that request. ADA Kat Runnels tried the case for the state.

Football field shooters indicted. On August 1, 2006, three men were indicted for shooting at football players engaged in a pickup game at the Municipal football stadium near Sullivan Arena and Chester Creek.

On July 9, 2006, a group of young men had gathered at the Municipal football field. After an argument between Norman Fagafaga, age 21, and another player, other players came and joined in on a pushing and shoving match on the side of the player. Clayton Nai, age 17, and Kalani Maalona, age 20, joined in on the side of Fagafaga.

Fagafaga, Nai, and Maalona then walked to the sidelines, pulled weapons and started firing at about 50 people on the playing field. Anchorage police arrived to see people running away. They found 53 expended cartridges, some .380, some 9mm, and some .45, on the sidelines. A gunshot hit one person, Daniel Leituala. He was shot in the face.

The three were charged with five counts of attempted murder for shooting at their opponents in the pushing and shoving match, one count of assault in the first degree for injuring Daniel Leituala, and 74 counts of assault in the third degree for placing the others in fear of being injured.

Trial is set for October 16, 2006, before Judge John Suddock. ADA John Novak presented the case to the grand jury.

Soldotna man convicted of sexual abuse of a minor in the first degree. On August 24, 2006, Brian Coopers was sentenced by Judge Hal Brown to 12 years in jail for the sexual abuse of a 13-year-old girl in Soldotna.

On June 16, 2004, a 13-year-old girl and her companions, ages 12 and 14, were walking through a wooded area of Soldotna between the Soldotna Mall and their adjacent residential neighborhood. In the woods, they met a man who told them he was "Brian Cooper." Brian Cooper offered them cigarettes and then tried to fondle or kiss the 13-year-old and her 14-year-old friend, but the 12-year-old disrupted the events by announcing that the three had to leave because parents were expecting them to "go home." All three got up to leave the wooded area and all started to walk out. Brian Cooper held the 13-year-old back. He dragged her to a more secluded spot out of the view of her departing friends and sexually abused her.

The friends did not notice the 13-year-old was not with them until they got out of the woods. By then, they could not see the 13-year-old anywhere. They went back into the woods and came upon the 13-year-old who was crying and pulling up her pants. She walked quickly past her friends and out of the woods, while "Brian Cooper" said, "Don't you guys want a cigarette?"

The girl and her two friends immediately reported their observations to Soldotna Police. It took a month to find "Brian Cooper" and to put his photograph in a line-up. On July 20, the 13-year-old victim and the 14-year-old positively identified Brian Cooper from a photographic lineup from a high school yearbook photo.

ADA Adrienne Bachman traveled from Anchorage to Kenai to try the case in April and appeared for the state at the sentencing.

[Fairbanks DAO](#)

For the month of August, the office received 76 new DUI cases. Seven of the cases were felony DUI's and 69 were misdemeanor DUI's. The felony unit received 74 new referrals and the misdemeanor unit received 358 new cases.

Domestic violence attempted murder. August started with a victim who received multiple stab wounds including at least one that collapsed a lung. The defendant stabbed the victim with a Leatherman tool the victim had given to the defendant at an earlier date. The victim identified the tool. Relatives of the victim stated the defendant, who denied the assault, never was without the tool and when located, the tool had the victim's blood on it.

Unique crime involving misconduct with weapons in the third degree. A defendant was contacted in regards to an unrelated investigation. The officer noticed both pant pockets looked like they contained pipe bombs, and when performing a weapons search based on the potential pipe bombs, the officer did in fact feel two objects constructed of pipe.

Upon removing the objects from the pockets, the officer discovered the items were in fact "zip guns" made from pipes. The zip guns were each loaded with 12 gauge buckshot and had a firing pin with a crude safety. The defendant admitted, and APSIN confirmed, a prior felony conviction, which resulted in an indictment for a felon in possession of a concealable firearm. The defendant stated he was on his way to a known drug dealer to scare the dealer because the dealer "shorted" the defendant in an earlier deal.

The dealer named by the defendant in this case was the victim of an April robbery involving two other defendants. One of the defendants in the April case discharged a shotgun narrowly missing the dealer. The April defendants stated the motive for the robbery was the recovery of money owed from a drug deal in which the dealer had not delivered the agreed on quantity of drugs.

[Kenai DAO](#)

It's summer on the Peninsula, so the cases are coming fast and furious, fueled by drugs and alcohol.

Felony DUIs are all the rage. One defendant was hospitalized at the time of his first felony DUI, so at the time, he wasn't arrested. Before he could even be indicted on the first charges, he was arrested for his second felony DUI.

Felony assaults have been popular this month as well. Knife-wielding women seem to be particularly prevalent. One lady was, according to the victim, whining about her old boyfriend and how unhappy she was. She kept saying she was going to commit suicide. The soon-to-be victim, having lost patience, told her to do it or be quiet. In a flash, the woman had a butcher knife and stabbed the victim completely through the thigh. He never saw or felt a thing until he looked down and saw the blade sticking out of his leg.

In another incident, a husband and wife were arguing, and as was his practice, the husband was going to leave to avoid an altercation. On his way out the door, the wife stabbed him in the back. According to the doctor who later examined the husband, the stab wound was three inches deep.

Knives were not the only weapons of choice. One woman hit her boyfriend so hard on the head with a cast-iron frying pan that she dented the pan...as well as his head.

Kodiak DAO

Convictions for misconduct involving controlled substance in the fourth degree. A 47-year-old Kodiak man was sentenced to 24 months in jail with 19 months suspended following his conviction for misconduct involving a controlled substance in the fourth degree. When officers served a search warrant on this defendant's house, he was found to be in possession of less than one gram of methamphetamine. He was also placed on probation for five years.

A 46-year-old Kodiak woman was sentenced to 24 months in jail with 13 months suspended following her conviction for misconduct involving a controlled substance in the fourth degree. The woman gave one gram of cocaine to her adult daughter. She was also placed on probation for five years on conditions which include that she be evaluated for substance abuse and complete any treatment as will be recommended.

A 34-year-old Kodiak man was sentenced to 90 days in jail and given a five year suspended imposition of sentence following his conviction for misconduct involving a controlled substance in the

fourth degree. When police served a search warrant on his home he was found to be cultivating more than 50 marijuana plants. One of this defendant's conditions of probation is that he be evaluated for substance abuse and complete any treatment as will be recommended. Like charges against his wife were also dismissed as part of the plea agreement.

Nome/Kotzebue DAO

Trio pleads guilty. In Nome, Jordan Adsuna, William Tate and Wassili Fancher all entered guilty pleas to various felonies for breaking into, trashing the inside of, and stealing from the local Safeway.

Last May, police found the trio out walking one morning before daylight. Each was dressed in black and carried a freshly stolen backpack still dangling with price tags and bulging with stolen goods. Fancher and Tate, who proved to be on release for a Kotzebue burglary, had little to say to the officers, but Adsuna did. He revealed that not only had they just come from Safeway, but that he and Tate had also recently burglarized Crazy Bill's Emporium, Milano's Pizzeria, Leo Rasmussen's Music Mart, Q Trucking Garage and Builder's Supply.

Adsuna then took an officer on tour recovering stolen property secreted in various hiding spots around town. Adsuna and Tate entered pleas to consolidated counts covering these additional burglaries. Sentencing for each will be later this fall.

Attempted murder trials. In Kotzebue, ADA Roetman has two attempted murder trials set for September.

Palmer DAO

Manslaughter conviction. On August 3, 2006, Kathleen Colbert was sentenced to serve seven years on a charge of manslaughter for shooting and killing her husband, Gary Colbert, who died of a single gunshot to the head.

There was a history of domestic violence between the defendant and the victim. The shooting occurred shortly after an argument during which Gary Colbert repeatedly struck the defendant. According to the defendant, she fired the handgun through the doorway

of their home as a warning shot. Gary Colbert was outside at the time.

After an all-day sentencing, Judge Eric Smith found the "domestic violence" aggravator and the "multiple instances of domestic violence" mitigator, but declined to find the "threat/compulsion" mitigator, despite testimony from defense expert Dr. Susan LaGrande regarding "battered women's syndrome." ADA Suzanne Powell tried the case for the state.

Other Convictions and Sentences

On August 23, 2006, a Palmer jury found John B. Phillips guilty as charged of fifteen criminal charges, including criminal impersonation, forgery in the second degree, theft in the second degree, theft in the third degree, and also determined that three statutory aggravators applied to all the counts. The case was part of a large identity theft investigation resulting in the indictment of eight individuals in addition to Phillips. The trial prosecutor was ADA Suzanne Powell.

Judge Beverly Cutler forfeited the \$100,000.00 bail posted by John Smith's mother for her failure to adequately monitor her son while on release to attend his father's funeral. The court found she allowed her son to be outside her presence during the five-hour release. John Smith escaped during the release and cut off two ankle monitors in the process. He will receive four years in prison (in addition to the 16 years previously imposed on the underlying offenses) for crimes related to his escape. ADA Richard Payne handled this case.

Steven Veltkamp was convicted, after a jury trial, of DUI. A Palmer jury also found David Baxter guilty of DUI and refusal to submit to a chemical test. ADA Jarom Bangerter was the trial prosecutor.

Anthony Miller was sentenced to four years with two years suspended and ten years probation on one count of sexual abuse of a minor in the second degree. Miller, a juvenile when he committed the crime, admitted to the sexual abuse allegation in juvenile court and the sexual abuse charge in the adult court. He was subject to dual sentencing. He was institutionalized in the juvenile case and completed his sex offender treatment. However, he failed to successfully complete his aftercare, so he

was sentenced as an adult offender. He is also required to register as a sex offender for 15 years.

Samuel Ives pled to assault in the second degree for the strangulation of his girlfriend/long-time friend. He will serve two years in prison and all other conditions will be open to the court. He also pled to a domestic violence aggravator.

Twenty-year-old Raymond McKee was sentenced on one consolidated count of sexual abuse of a minor in the second degree for his sexual contact and penetration with three minor girls. He received five years with four years suspended. The sentence runs consecutive to the one year flat he received on an eluding charge.

Phillip Kennedy was sentenced to three years with two suspended after he pled to one count of sexual abuse of a minor in the second degree. Defendant will enter in and complete the Department of Corrections IDP+ Mentally Ill Offender Aftercare Program, as well as complete sex offender treatment and register as a sex offender for 15 years.

Forty-two people were indicted on new felony charges by the Palmer grand juries this month.

SAVE THE DATE

September 18-19 Civil Division Supervisor's Retreat-
Alyeska Resort